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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 119

SAMUEL REISMAN and CHARLES M. TRAMMELL, BERT B. RAND, HANS A. NATHAN, d/b/a TRAMMELL, RAND & NATHAN, *Petitioners,*

v.

HON. MORTIMER M. CAPLIN and ROBERT S. MACCLURE and EDWARD H. HARNEY, co-partners and all other co-partners of ROBERT S. MACCLURE, as a class, d/b/a PEAT, MARWICK, MITCHELL & CO. (a co-partnership), *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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HON. MORTIMER M. CAPLIN and ROBERT S. MACCLURE and EDWARD H. HARNEY, co-partners and all other co-partners of ROBERT S. MACCLURE, as a class, d/b/a PEAT, MARWICK, MITCHELL & CO. (a co-partnership), *Respondents*.

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I.

Introduction

In his brief before this Court Respondent Caplin fails to support the decisions of either Court below. Neither "standing to sue" nor "sovereign immunity" are supported as grounds for decision. For even where there is a section appearing to contain argument on either doctrine, Respondent only re-argues (in different form) that

the remedies provided by Section 7604 of Title 26, U.S.C. are adequate and exclusive.

We submit that § 7604 enforcement jurisdiction is not exclusive as a matter of law and is inadequate on the facts of this case.

Respondent Caplin pays lip service only to the doctrine of sovereign immunity upon which the decision of the Court of Appeals for the District of Columbia rests.[1] A few words in reply to Respondent's contention for further broadening of this doctrine are indicated nevertheless.

II.

The doctrine of sovereign immunity should not be extended to bar judicial review of unlawful administrative action

Carried to its logical conclusion, the Government's brief and argument in support of the application of the sovereign immunity doctrine by the Court below (Brief, pp. 31, et seq.) contend for immunity from review of all administrative action. The gravamen of Respondent's reasoning here is that otherwise, "Government's investigation would be stopped in its tracks", and that *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, at 704, *Malone* v. *Bowdoin*, 369 U.S. 643, and *Dugan* v. *Rank*, 372 U.S. 609, proscribe any judicial interference with the sacrosanct right of the Government to investigate.

We respectfully submit that this Court did not intend to enunciate, and to this day has not enunciated such a broad doctrine.

Professor Louis L. Jaffe in an article, "Suits Against Governments and Officers: Sovereign Immunity", 77 Har-

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[1] In opposition to the Petition for Certiorari, the Solicitor General all but suggested that reliance by the Court of Appeals on the sovereign immunity doctrine was in error: "This holding [of the Court of Appeals] admittedly raises questions of some difficulty [which] need not, and should not, be decided in this case." (Opposition, p. 6).

vard Law Review, No. 1 (November, 1963), stated, at page 2:

> "[T]he doctrine of sovereign immunity, whatever it is or is not, has never had, and does not have today, much impact on the judicial control of administrative illegality, that question being clearly litigable within the reach of the actions and prerogative writs against officers. Recent decisions of the Supreme Court have unfortunately encumbered the situation with a certain amount of latter-day dicta, but these dicta, narrowly construed (as they should be), ought not be permitted to impair this generality. Insofar as these decisions recognize ancient categories of immunity they are, at least, tolerable but they should not be the starting point for new generalizations which impair the long-established accountability of government to suit for alleged illegal activity."

The sworn complaint and uncontroverted affidavit before the District Court show illegality of action by Respondent rather than erroneous application of law or fact in an area where Respondent exercised discretion. If litigation of these uncontradicted facts were to be barred *ab initio* as a suit against the sovereign, the historic guaranties and protection of the rights of individuals against arbitrary and illegal actions of administrative officials would be severely curtailed. We would be one step nearer to what we most abhor, "the police state", if the policeman (for that is all a Special Agent of the Internal Revenue Service is) were to be all-powerful and his illegal actions immune from judicial scrutiny.

There is not even practical need for such absolute immunity: an orderly trial in the District Court would not "stop the investigation of the Government in its tracks". It would make sure, however, that such investigation proceeded legally and *on* the "tracks" provided by the Constitution and by the Congress.

As Professor Jaffe said in his article (Op. Cit. at p. 37):

> "Taking into account the rather special conditions underlying the availability of mandamus, one might, I think, conclude from the actual cases that nothing has changed but the manner of writing the opinion. The limitation of the writ of mandamus, which we should in the past have attributed to the breadth of official discretion, is not explained in terms of sovereign immunity. However that may be, the explanation in terms of discretion seems to me much more to the purpose. Why at this late day insist on refurbishing the doctrine of sovereign immunity? Let it, if you will, function within such limits as American history has imposed, e.g., an action for breach of contract; but where the writs and the actions have been used before, let them continue to flourish and where needs be expand. Away with fruitless and unhistorical attempts to determine whether a suit is 'really' against the state."

III.

Petitioners do not have an adequate remedy "at law"

Respondent urges this intolerably broad application of the sovereign immunity doctrine on an "end justifies the means" basis, namely, for "practical considerations of tax administration". (Resp. Br., pp. 38, seq.) He says that this suit "like any suit to quash a summons,[2] wastes time and unnecessarily burdens the Courts, as well as the Executive" (Resp. Br., p. 40), and that, "these delays and fragmented proceedings are avoided by application of the doctrine of sovereign immunity" (Resp. Br., p. 41).

In justification of a policy so foreign to our concept of justice, Respondent argues that the remedies provided by § 7604 (inadequate though they appeared to the Court of Appeals for the Second Circuit in *Application of Colton*,

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[2] A number of the cases cited by Respondent in support of adequacy of § 7604 remedies originated as complaints and motions to quash summons rather than as § 7604 enforcement petitions, e.g., *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, CA 2 (1962).

291 F.2d 487) are remedies at law, and are "orderly and adequate" (Resp. Br., p. 16). He argues further that resort to equity is barred because the possibility of arrest "indeed is no penalty at all" (p. 26), no threat of "irreparable harm" (p. 48), nor works any "significant hardship or injustice upon the Petitioners".

a. The persons summoned were likely to comply; obviating § 7604 Proceedings.

To Petitioners' argument that Peat-Marwick might preclude § 7604 review entirely by complying with the summons rather than risk arrest, expensive litigation and opprobrium, Respondent makes two strange answers: the first can be summarized in two words as "too bad", or stated in Respondent's language: "Anyone who entrusts his papers to another assumes the risk that the bailee will give them to another" (Br., p. 29).[3]

This is the very heart of the lawsuit. Petitioners contend that a taxpayer should be able to obtain the effective assistance of counsel when his liberty and property are at stake, *without* assuming a bailor's risk that his attorneys will have to turn their preparation over to Respondent. As pointed out in our main brief, the Ninth Circuit in *United States* v. *Judson*, 322 F.2d 460, not only agrees with this contention, it has gone beyond it by protecting even the accountants' work-product against abuse of subpoena power.

Respondent's second and (as Respondent terms it) "most important answer" to the argument of inadequacy of remedy (because compliance would prevent § 7604 proceedings), is that "either Petitioners or Bromley are free to bring an injunction suit against Peat-Marwick." This is exactly what Petitioners did do below. Peat-Marwick

[3] This seems to be a very ill-chosen argument in a case where Petitioners were induced to enter into the bailment by Respondent's suggestions of civil settlement negotiations. (Resp. Br., p. 3).

were Defendants; the Court had personal jurisdiction of Peat-Marwick. Respondent, however, successfully deprived Petitioners of the very remedy he now urges on them, by having this suit dismissed not only against Petitioners, but also against Peat-Marwick.

b. There is no assurance that Petitioners would be able or allowed to intervene.

Neither Petitioner nor taxpayer would be necessary parties to enforcement proceedings against Peat-Marwick. *Chapman* v. *Goodman*, 219 F.2d 802.

Respondent argues, however, that "interested third parties may also appear and assert their rights to non-disclosure of documents or information" (p. 16), citing Rule 24 F.R.C.P. as authority. He implies that either taxpayer or Petitioners could have intervened in enforcement proceedings brought in three widely-separated jurisdictions, even though they were neither actual nor necessary parties thereto. We submit that such intervention is by no means assured or adequate.

Assuming that Respondent would not have proceeded *ex parte* (as he frequently does); assuming further that Petitioners would have had adequate notice of such enforcement proceedings, such motion to intervene would not be granted as a matter of right.

Our research failed to produce one case where the Court expressly held that there is intervention of right under Rule 24(a)(2), F.R.C.P.[4] in a § 7604 proceeding.

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[4] (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other

We found no statute or authority on which to base intervention of right under Rule 24(a)(1); nor any case showing express reliance on Rule 24(b) F.R.C.P., permitting intervention as a matter of discretion.

Assuming that the Federal Rules are generally applicable to Section 7604 enforcement proceedings to the extent and "whenever the District Court deems them helpful" (7 Moore, Fed. Practice 4442), permission to intervene therefore would be subject to the discretion of the District Court. If such discretion were exercised adversely to the prospective intefvenor, be it petitioners or the taxpayer, no appeal will lie, unless there was abuse. 4 Moore Federal Practice 102 and cases cited.

Neither petitioners nor taxpayer, once permitted to intervene in the District Court proceedings, would be able to appeal from an adverse order, unless Peat, Marwick & Mitchell would also prosecute the appeal. In *U. S.* v. *Boccuto*, 274 F.2d 860 (1959), where a summons was directed to an attorney, an appeal brought by the taxpayer was dismissed for want of jurisdiction because no appeal had been taken "by the aggrieved party", the attorney to whom the summons had been issued.

In summary, petitioners submit that they have shown the remedies provided by Section 7604 (somewhat loosely labeled by Respondent as remedies "at law") to be inadequate in general. They are particularly inadequate on the specific facts at bar because (1) the constitutional rights of the taxpayers required prompt protection in a centrally located forum, (2) petitioners and the taxpayer would be neither actual, nor indispensable nor necessary parties

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disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . .

in Section 7604 proceedings, (3) petitioners and the taxpayer have little assurance of being allowed (or being physically able) to intervene in such proceedings in three different jurisdictions; and (4) it is unlikely that Section 7604 proceedings would have been brought at all, because Peat, Marwick & Mitchell would have complied with the subpoenas.

IV.

Section 7604 jurisdiction is not exclusive.

Respondent Caplin in the heading of Chapter 1 of his brief states that Section 7604 provides an adequate and "*exclusive*" forum. The brief itself cites no authority whatever for purported exclusiveness of § 7604 review, except *U. S.* v. *Babcock* (which, as shown below, is authority for petitioners' contentions to the contrary). Nor have Petitioners found a single case to that effect.

Respondent urges that the scheme provided by Congress is "comprehensive". Congress therefore must have intended that it was "exclusive". Neither statement is correct.

If Congress had intended to make Section 7604 review the only review available, it would have said so (*U. S.* v. *Babcock*, 250 U.S. 328.)

The variety of summary proceedings provided by Section 7604 can be set in motion only by, and at the option of, the Government. These proceedings do not provide a comprehensive, let alone an adequate system of review. For they can take the form of an *ex parte* order for enforcement or even of an *ex parte* order for "arrest or attachment for contempt", all without hearing for the party summoned, let alone right or even opportunity for third parties to intervene. And, while the reported cases are few (*Sale* v. *U. S.*, 228 F.2d 682, *In re Wolrich*, 84 F. Supp. 481, *Application of U. S.*

(Carroll), 246 F.2d 762), there is no assurance that their number may not increase. If this Court upholds the contention of Respondent that as summary a proceeding as provided under Section 7604, constitutes a comprehensive, adequate and exclusive forum for the citizen-taxpayer and his attorney, there will be no protection against an over-zealous special agent who abuses subpoena power to suit his purpose.[5]

Today the agent may be over-zealous; tomorrow he might be malicious. Today the citizen-taxpayer, the attorney, or the accountant can rely on Respondent's informal statement that the Department of Justice will not initiate contempt proceedings or institute criminal prosecution under § 7610, unless the refusal to comply was "in outrageously bad faith". Today, the possibilities that severe penalties might be imposed upon Peat-Marwick might be indeed "remote"[6] (Brief, p. 44); tomorrow they might not.

The *Babcock* Case

In *U. S.* v. *Babcock*, 250 U. S. 328, 39 S. Ct. 464 the horse of an Army Captain died of strangulation because of an improper Government-furnished forage ration. The Captain was denied compensation in view of the absence of statutory provisions providing for reimbursement of this type of loss. This Court held that "where a statute *creates a right* and provides a *special remedy*, that remedy, is exclusive" (p. 331), not as Respondent puts it in his

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[5] Concededly a great part of the work papers subpoenaed in this case were prepared (and a great number of the records were collected) for the specific purpose of arriving at a civil settlement. Petitioners in having this work done by Peat, Marwick & Mitchell, relied on the statement that no criminal prosecution was contemplated. (See Respondent's Statement of Facts, Brief, p. 3.)

[6] Even this "remote" possibility, however, would cause a national accounting firm like Peat, Marwick & Mitchell to comply on or prior to the return date of the subpoena.

brief, "where Congress has specified one remedy, this normally excludes any other." (Emphasis supplied) Most important, the statute relied on expressly and *in haec verba* made the remedy created by it exclusive and final.

In the instant case, the statute involved creates no rights for taxpayer or Petitioners. It creates rights only for the Respondent and provides remedies only for Respondent. The rights of Petitioners and of taxpayer that are being sought to be enforced by the action at bar are not created by Section 7602 or Section 7604. They were created by the Constitution and the common law. They are the rights of the citizen to his basic freedoms under the Fourth and Fifth Amendments, the rights of attorneys to practice law. These rights are capable of enforcement under the general equity jurisdiction of the District Courts. There is no authority cited by Respondent (nor can any case be found by Petitioners), nor can *Babcock* be interpreted to hold that the enforcement of these rights of Petitioners and their clients was limited by Congress to the forum provided for *Respondent* in Section 7604(a).

As the Court of Appeals for the Second Circuit pointed out in *Application of Colton*, 291 F.2d 487 (C.A. 2, 1961), in construing Section 7604:

> ". . . [R]esort by the Government to the district court under § 7604(a), 26 U.S.C.A. § 7604(a), *is permissive only; this is in no way a condition to any other action.*" (Emphasis supplied.)
>
> —at p. 489

The complaint below is in the same jurisdictional status as the motion filed in *Colton*.[7]

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[7] In *Colton*, instead of an original complaint, a motion was filed to vacate the summons. The Second Circuit held that the motion had the same effect as the filing of an original complaint, raising the issues set forth in the motion.

V.

Exercise of its jurisdiction by the District Court would have expedited rather than delayed the Government's tax investigation

Throughout Respondent's brief, it is stressed that the exercise of jurisdiction by the District Court would have "stopped the Government's investigation in its tracks" or at least delayed it intolerably.

We reject the implication that the method chosen by Petitioners to obtain judicial review of the subpoenas was dilatory. On the contrary, instead of waiting to intervene in three different District Courts, Petitioners sought one centrally located forum and brought all parties concerned before the Court long before the return date of the summonses. A counterclaim for enforcement (rather than the motion to dismiss) would have brought speedy adjudication. The persons summoned, Peat, Marwick & Mitchell were before the Court. Instead of accepting the sworn allegations of the complaint as true, Respondent could have met these allegations on the merits (if, indeed, there was a *bona fide* purpose for the subpoenas). The fact that Respondent chose to proceed by motion to dismiss indicates to us that there may have been doubt as to the merits of his side of the controversy. We respectfully submit that if any delay there was, such delay was caused by the failure of Respondent to meet the challenge to the subpoena on the merits.

The requirement of otherwise financing litigation in three geographically separate circuits, the inordinate expense of obtaining new local counsel (at least in Chicago and New York) and Petitioners' choice of a single forum in which the summoned parties, Peat, Marwick & Mitchell, were equally subject to an order of enforcement, should be sufficient support for our vehement rejection of the many innuendoes in briefs filed by Respondent throughout this litigation that the suit below was brought for delay, or to have "two rounds" of litigation.

VI.

Conclusion

There having been no sworn affidavit or opposition to the uncontradicted and sworn allegations of the complaint, it is respectfully prayed that the decisions of the lower courts be reversed with directions to enter the injunction prayed for.

Respectfully submitted,

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Dated: December 9, 1963.